

1
2
3
4
5
6
7
8 UNITED STATES DISTRICT COURT
9 WESTERN DISTRICT OF WASHINGTON
10 AT TACOMA

11 MICHELLE A. HART,

12 Plaintiff,

13 v.

14 MICHAEL J. ASTRUE, Commissioner of the
Social Security Administration,

15 Defendant.

CASE NO. 10cv5788-RBL-JRC

REPORT AND RECOMMENDATION

Noted for July 8, 2011

16 This matter has been referred to United States Magistrate Judge J. Richard Creatura
17 pursuant to 28 U.S.C. § 636(b)(1) and Local Magistrate Judge Rule MJR 4(a)(4), and as
18 authorized by Mathews, Secretary of H.E.W. v. Weber, 423 U.S. 261, 271-72 (1976).

19 After considering and reviewing the relevant record, the undersigned finds that the Court
20 should grant defendant's request to remand this matter to the administration for further
21 proceedings, pursuant to 42 U.S.C. 405(g), sentence four (see Defendant's Brief Requesting
22 Remand for Further Administrative Proceedings, ECF No. 24). See also Shalala v. Schaefer, 509
23 U.S. 292, 296-97 (1993). As conceded by defendant, judgment should be for plaintiff (see
24 Defendant's Brief Requesting Remand, ECF No. 24, p. 3 n.1).
25
26

PROCEDURAL HISTORY

On September 7, 2010, the Appeals Council denied plaintiff's request for review of the written decision by the Administrative Law Judge (hereinafter "the ALJ") denying plaintiff's application for disability insurance benefits (see Tr. 102). Therefore, this written decision by the ALJ is the final agency decision subject to judicial review. See 20 C.F.R. § 404.981.

On October 26, 2010, plaintiff filed a complaint in this Court, seeking judicial review of the written decision by the ALJ (ECF No. 1). In her opening brief, plaintiff requests for relief that the Court reverse defendant's final decision with a direction for an award of benefits, or, in the alternative, that the Court reverse and remand this matter to the administration for further consideration pursuant to 42 U.S.C. § 405(g), sentence four (ECF No. 17, p. 2).

On June 6, 2011, defendant filed a Brief Requesting Remand for Further Administrative Proceedings, (ECF No. 24), in which defendant concedes that the ALJ's written decision failed to address plaintiff's alleged mental impairment (see id., p. 2). Defendant also concedes that, following a proper evaluation of the evidence, "the ALJ should, to the extent appropriate, reconsider Plaintiff's impairments, credibility, residual functional capacity, and Plaintiff's ability to perform past relevant work or other work existing in significant numbers in the national economy" (id.). The Court agrees with the concessions of defendant.

DISCUSSION

The Court notes that the only relief that would not be afforded plaintiff by defendant's concessions and the adoption of this Report and Recommendation is the request for relief that this Court remand this matter for a finding of disability and a direct award of benefits (see Opening Brief, ECF No. 17, p. 2).

1 The Ninth Circuit has put forth a “test for determining when evidence should be
2 credited and an immediate award of benefits directed.” Harman v. Apfel, 211 F.3d 1172,
3 1178 (9th Cir. 2000). It is appropriate where:

4 (1) the ALJ has failed to provide legally sufficient reasons for
5 rejecting such evidence, (2) there are no outstanding issues that must
6 be resolved before a determination of disability can be made, and (3)
7 it is clear from the record that the ALJ would be required to find the
8 claimant disabled were such evidence credited.

9 Harman, 211 F.3d at 1178 (*quoting* Smolen v. Chater, 80 F.3d 1273, 1292 (9th Cir.1996)).

10 Here, outstanding issues must be resolved before a determination of disability can be
11 made. See Smolen, 80 F.3d at 1292. In addition, The ALJ is responsible for determining
12 credibility and resolving ambiguities and conflicts in the medical evidence. Reddick v. Chater,
13 157 F.3d 715, 722 (9th Cir. 1998); Andrews v. Shalala, 53 F.3d 1035, 1043 (9th Cir. 1995). If
14 the medical evidence in the record is not conclusive, sole responsibility for resolving conflicting
15 testimony and questions of credibility lies with the ALJ. Sample v. Schweiker, 694 F.2d 639,
16 642 (9th Cir. 1999) (*quoting* Waters v. Gardner, 452 F.2d 855, 858 n.7 (9th Cir. 1971)); see also
17 Calhoun v. Bailer, 626 F.2d 145, 150 (9th Cir. 1980).

18 For these reasons, remand is appropriate to allow the Administration the opportunity to
19 consider properly all of the evidence anew as a whole. See Sample, 694 F.2d at 642. The Court
20 therefore should grant judgment to plaintiff and remand this matter to the administration for
21 further proceedings.

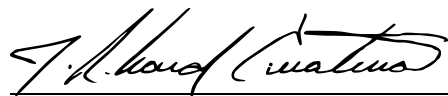
22 CONCLUSION

23 Given the record and defendant’s concessions, the Court recommends that the District
24 Judge order the case be **REVERSED** and **REMANDED** pursuant to sentence four of 42 U.S.C.
25 § 405(g).
26

1 Because of the errors in the ALJ's decision regarding review of the medical evidence, the
2 administrative law judge assigned to this matter following remand should reevaluate the
3 evidence as a whole, including the medical evidence supplied by Dr. Clark, as well as that
4 supplied by Drs. Steele and Stanley. Plaintiff should be provided a new hearing and have the
5 opportunity to appear, testify, submit additional evidence and make new arguments at this new
6 administrative hearing. The administrative law judge assigned to this matter following remand
7 should reevaluate the record anew as a whole, including plaintiff's impairments, credibility,
8 residual functional capacity and ability to perform past relevant work or other work existing in
9 significant numbers in the national economy. The administrative law judge on remand should
10 make a new, full, sequential disability evaluation and should issue a new decision.
11

12 Pursuant to 28 U.S.C. § 636(b)(1) and Fed. R. Civ. P. 72(b), the parties shall have
13 fourteen (14) days from service of this Report to file written objections. See also Fed. R. Civ. P.
14 6. Failure to file objections will result in a waiver of those objections for purposes of de novo
15 review by the district judge. See 28 U.S.C. § 636(b)(1)(C). Accommodating the time limit
16 imposed by Rule 72(b), the clerk is directed to set the matter for consideration on **July 8, 2011**,
17 as noted in the caption.
18

19 Dated this 16th day of June, 2011.
20

21
22 

23 J. Richard Creatura
24 United States Magistrate Judge
25
26